UNDERSTANDING THE OPEN MEETING LAW

A HANDBOOK FROM NORFOLK COUNTY

DISTRICT ATTORNEY WILLIAM R. KEATING

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Preface from the District Attorney

The Open Meeting Law plays an important role in our democratic society: it ensures public access to the governmental process. Without the Open Meeting Law, the fundamental nature of the participatory democratic process that characterizes local government in Massachusetts would be at risk.

The role of the District Attorney, who is charged with enforcing the Open Meeting Law, is twofold. Although we are ready to promptly address violations of the law, we also seek to educate public officials about the requirements of the law to prevent violations from occurring. It is our privilege to provide this information, and to respond to inquiries regarding the Open Meeting Law arising in your community. We hope that this handbook helps governmental officials and citizens better understand and comply with the requirements of the Open Meeting Law.

William R. Keating
District Attorney
June 2002

Acknowledgments

The first version of this manual was written by Norfolk County Assistant District Attorney John Corbett while on the staff at the Plymouth County District Attorney's Office. In 1994, Norfolk County Assistant District Attorneys John Corbett and Robert Cosgrove revised it. This third version represents an update current through June 2002, and includes contributions by assistant district attorneys assigned to the Norfolk County Appeals Unit: Robert C. Cosgrove, Chief of the Appeals Unit, Tracey A. Cusick, Ellen McCusker Devlin, Varsha Kukafka, Susanne O'Neil, James Reidy and Brian Wilson. As with all practice manuals, this manual is intended to be a user's guide rather than a definitive statement of the law. Users should consult court reports and Legislative action to determine whether changes or new interpretations of the law have been made.

This manual was edited and prepared by Assistant District Attorney Tracey A. Cusick
of the Norfolk County District Attorney's Appeals Unit.

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INTRODUCTION

In 1958, the Massachusetts State Legislature joined a growing number of states passing laws ensuring public access to meetings of governmental bodies. This Handbook deals primarily with Massachusetts General Laws c. 39, §§ 23A, 23B & 23C, known as the "Open Meeting Law" the enforcement of which falls within the jurisdiction of the Office of the District Attorney. At the time of this revision, the Open Meeting Law had last been amended by the Legislature in 1994.

The Open Meeting Law was intended to promote the public's understanding of government operations by eliminating much of the secrecy that frequently surrounded deliberations and decisions upon which public policy was based. The Open Meeting Law and related statutes arose from the principle that our democratic process depends on the public having knowledge of the considerations underlying governmental action. Without this knowledge, citizens are unable to evaluate the merits of the actions of their representatives.

JURISDICTION

The Norfolk County District Attorney's Office handles Open Meeting Law cases from the following municipalities:

Avon
Braintree
Brookline
Canton
Cohasset
Dedham
Dover
Foxborough
Franklin
Holbrook
Medfield
Medway
Millis
Milton
Needham
Norfolk
Norwood
Plainville
Quincy
Randolph
Sharon
Stoughton
Walpole
Wellesley
Westwood
Weymouth
Wrentham

Although the Town of Bellingham is physically located in Norfolk County, it is served by the Worcester County District Attorney's Office. See Chapter 550, Acts of 1980.

The Attorney General is charged with enforcing the Open Meeting Law with respect to governmental bodies created by state agencies. G.L. c. 30A, § 11A ½.

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MEETINGS

"All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided in this section." G.L. c. 39, §. 23B.

> ***Meeting:*** "any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power

is discussed or considered; but shall not include any on-site inspection of any project or program." G.L. c. 39, § 23A.

- "*Corporal:*" Of or relating to the body. The American Heritage Dictionary of the English Language, 4th edition, 2000.
- A simple exchange of views on a public matter by members of a board constitutes a meeting. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 634, n. 6 (1985) (rejecting argument that board may meet to discuss public business in private if there is no specific intention to vote or make final decision on an issue).
- Electronic "telepresence" of a board member by means of videoconferencing or speaker phone equipment cannot be used to achieve a quorum, as the member is not physically present within the meaning of the statute. The telephone was in widespread use in 1958; if the Legislature intended to permit electronic presence, it would have so stated.
- The mere absence of a quorum does not mean that discussions of public business may be discussed free of the requirements of the Open Meeting Law. Private "serial" conversations by a majority of board members in preparation for public discussion and vote have consistently been held by the Norfolk County District Attorney to violate the law, a position that is consistent with that adopted by other district attorneys and that has been enforced in court. See Attorney General v. Board of Selectmen of Lexington, No. 88-3644 (Middlesex Superior Ct., August 18, 1989). A violation occurs when discussions occur via telephone, email, internet, or other electronic means. Although a quorum cannot be achieved by electronic presence, the Open Meeting Law can be violated without the physical presence of the participants. All board members who privately discuss public business run the risk of violating the law.
- The Open Meeting Law does not specify the location of meetings. Absent extraordinary circumstances, meetings in private homes are discouraged because the locations are often not accessible; it is a violation of the Open Meeting Law to choose a meeting site at which the public could be prevented from attending the meeting.
- The Legislature's intention to require open meetings in most circumstances is made clear by the broad definition of "meetings" and "deliberations."

Governmental body: "*every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting." G.L. c. 39, §. 23A.*

- Subcommittees appointed by a governmental body are subject to the Open Meeting Law. Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, 434-436 (1984). Subcommittees and special purpose committees containing members who are not on the parent body are also subject to the law. As long as a body, however constituted, is carrying out delegated functions or responsibilities of the parent body, its meetings must be open to the public. The fact that the subcommittee's authority may extend only to making recommendations does not render the law inapplicable.
- While the Open Meeting Law does not apply to individual public officers, such as mayors or chiefs of police, few collegial groups escape its requirements. The law cannot be circumvented by delegation of public business to subcommittees "however elected, appointed or otherwise constituted."
- A "subcommittee of one" is not, however, subject to the Open Meeting Law. Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 124 (2000).

Quorum: "A simple majority of a governmental body, unless otherwise defined by constitution, charter, rule or law applicable to such governing body." G.L. c. 39, § 23A.

Deliberation: "A verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." G.L. c. 39, § 23A.

- Administrative matters such as scheduling the date, time and place of a meeting, or soliciting agenda items need not be conducted at an open meeting. Board members are cautioned, however, not to discuss the public business to be addressed at the meeting as such discussions would likely violate the Open Meeting Law.
- Joint letters, emails, or other written communication usually entail "deliberation" and are thus subject to the Open Meeting Law.

The Public: The Open Meeting Law does not specifically define who constitutes "the public." However, nothing in the statute suggests that any limitation should be read into the definition. Thus, any individual who wishes to attend a meeting subject to this law, regardless of whether that person resides or does business in the municipality, may attend the meeting. Neither reporters nor non-residents may be excluded from meetings.

- If a large number of people are expected, a location large enough to reasonably accommodate everyone must be secured. If such accommodations are unavailable despite diligent efforts to secure them, a sound and/or video system should be arranged to permit persons outside of the main room to observe the proceedings. Facilities should be handicap accessible.
- If the meeting begins or continues outside of the regular operating hours of the location, the governmental body must ensure that the site remains accessible to anyone arriving late. For example, if a custodian normally locks the exterior doors of a building at 8:00PM, and a school committee meeting is in progress in the building after 8:00PM, the governmental body must ensure that a door remains unlocked to provide access, or that a latecomer is otherwise able to access the building and attend the meeting.
- Discussions at meetings must be audible to everyone in attendance. Thus, if the acoustics in the meeting location are poor, or if a member of the board is soft-spoken, steps must be taken to make the discussion audible to the public. Microphones and amplification equipment frequently provide a solution to acoustical problems.
- Discussions at meetings must be intelligible to all present. For example, board members may not refer to written materials solely by page or paragraph number if the materials are not available to the public in attendance. If discussions can be understood only by reference to written materials, the written materials must be made available to the public. Copies could be provided, or a projector could be used to publish

materials to the public.

- Contrary to popular belief, the Open Meeting Law provides no general right for a member of the public to address a governmental body. In some circumstances, other laws, municipal charters, or regulations provide a right of the public to speak, and the body may of its own accord afford such a right. A member of the public may not speak during a meeting without the permission of the presiding officer. If, after a warning from the presiding officer, the person persists in disorderly conduct, the presiding officer may order the disruptive person to leave. If the disruptive person refuses to leave, a constable or police officer may remove him or her. G.L. c. 39, § 23C.

The Open Meeting Law "shall not apply to any chance meeting or a social meeting at which matters relating to public business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power." G.L. c. 39, § 23B.

- A verbal exchange on a public issue within the jurisdiction of a public board that takes place between a simple majority of the members of that board is almost always governed by the formalities prescribed in the Open Meeting Law.
- Chance meetings or social encounters during which board members happen to mention "matters relating to" official business are exempted from the statute. Such meetings, however, cannot be used to circumvent the letter and spirit of the Open Meeting Law. Discussions of official business at chance or social encounters are strongly discouraged.
- A board that uses its formal meetings merely to ratify decisions made in private is in violation of the Open Meeting Law.
- A consultation between members of a board and the board's attorney constitutes an exchange of views among members of the board, and is thus subject to the Open Meeting Law. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 631-633 (1985)(rejecting argument that consultation with attorney did not constitute a meeting and deliberation of the board, as it did not consist primarily of communication between board members themselves).
- As the above case illustrates, courts are not receptive to hyper-technical arguments that a particular gathering of board members does not fall within the statute because a particular conversation did not amount to deliberations, or that a particular verbal exchange was not in the course of attempting to arrive at a decision.
- Communication about governmental business by a quorum of board members via email constitutes a violation of the Open Meeting Law. Because email often allows simultaneous and immediate communication with many people, its use can frequently result in a violation of the law. Board members should use caution if using email to communicate administrative matters such as the time or location of a meeting, as such exchanges could lead to exchanges about governmental policy between a quorum and thus violate the Open Meeting Law.
- When quorums of two or more bodies meet jointly, it is a meeting of each of the governmental bodies, and therefore both bodies must give notice of the meeting. For example, if a Board of Selectmen invites Board of Health members to attend a scheduled meeting of the Selectmen, and a quorum of the Board of Health attends, it is also a meeting of the Board of Health. Both the Board of Health and the Selectmen should provide notice of a meeting of the respective board.

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NOTICE

"Except in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town." G.L. c. 39, § 23B.

Emergency: "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." G.L. c. 39, § 23A.

- The purpose of the notice provisions of the Open Meeting Law is obvious. The public's right to attend the meetings of a governmental body would be meaningless if citizens are not provided with a means to inform themselves of the time, date and place of the meeting. The posting requirements are not an empty formality but rather the core of the statute.
- The postings must give the public actual notice of the time, date and place of a meeting. Where the meeting is to be held in a large building, such as a town hall, the room number or other information identifying exactly where the governmental body will meet must be provided. No posting is adequate if it leaves the public in doubt as to the location where a meeting is to be held.
- Although the Open Meeting Law imposes no notice requirements for cancellation of meetings, a pattern of unannounced cancellations could render notice ineffective.
- A governmental body may comply with the notice requirements by filing and posting in advance a printed schedule of future meetings. If such a schedule of future meetings is compiled and posted, there is no need to file and post a separate notice of each meeting prior to holding that meeting. In such case, the body should in fact meet regularly at the scheduled time and place and, if there is an adjournment or cancellation, it should be posted; conceivably, a pattern of unannounced cancellations may render the notice ineffective.
- A governmental body does not satisfy the notice requirements by posting a notice indicating a range of times within which it may meet. For example, posting a notice indicating that a board or boards intend to meet during the hours of 9:00AM to 5:00PM, Monday through Friday is meaningless because it fails to provide the public with actual notice of the exact date, time and place of the meeting so that those citizens who wished to attend may do so. The illegality of the posting described above is therefore obvious.
- Agendas need not be provided with notice of the meeting. If agendas are provided, they should be prepared in good faith, as an agenda suggests the discussion of the listed items to the exclusion of everything else.

Emergency Meetings

- The usual notice requirements need not be complied with when a meeting is occasioned by an emergency which is defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." G.L. c. 39, § 23A. However, notice requirements should be complied with to the extent possible; the fact that an emergency may make it impossible to provide 48 hours notice, as much notice as possible should nevertheless be posted. For example, if at 8:00AM the School Committee discovers severe damage to a school building and decides to meet at 6:00PM that evening to discuss alternative arrangements for classes, the notice should be posted at 8:00AM.
- The principal Massachusetts case touching on what constitutes an "emergency" meeting under the Open Meeting Law is Pearson v. Board of Health of Chicopee, 402 Mass. 797 (1988). There, the Board of Health did not give notice of a meeting with restaurant owners about reopening a restaurant that had been closed for twelve days due to salmonella poisoning. The trial court, with the apparent approval of the Supreme Judicial Court, considered the claim of a "health emergency" to be "an open and flagrant" violation of the Open Meeting Law.
- Similarly, the Appeals Court affirmed a trial judge's determination that an "emergency" meeting to remove a clerk of the board of assessors who had walked off the job, and a subsequent "emergency" meeting to reinstate him were improperly called, as no "emergency situation" existed. Pentecost v. Town of Spencer, 29 Mass. App. Ct. 991, 992 (1993).
- Claims of emergency will be carefully scrutinized to ensure that they do not lead to an improper denial of the public's right to attend meetings. The Supreme Judicial Court has applied such scrutiny to claims of "emergency" under other statutes. See Pioneer Liquor Mart v. Alcoholic Beverages Control Comm., 350 Mass. 1 (1965).
- Minor events are not emergencies for the purpose of the Open Meeting Law. "An 'emergency' is a pressing necessity, an exigency, a sudden and unexpected happening, an unforeseen occurrence or condition, and event or occasional combination of circumstances that calls for immediate action. Thus, the term 'emergency' does not mean expediency, convenience or best interest, and the injury at risk in the emergency is often limited to physical injury to persons or property, not merely legal injury or threat of legal injury." Ann Taylor Schwing, Open Meeting Law 2d (2000), § 5.22 (citations omitted).
- The subject matter to be discussed at an emergency meeting is strictly limited to that necessitated by the emergency. No other business may be discussed. For example, an emergency meeting by a board of selectmen to nominate someone to replace a chief of police who unexpectedly resigns cannot be used as an occasion to discuss the granting of a liquor license.
- It appears that a board may not enter executive session at an emergency meeting, since, as discussed later, the first prerequisite for executive session is that the government body convenes "in an open session for which notice has been given."

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MINUTES

"A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive sessions, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting." G.L. c. 39, § 23B.

Provisions pertinent to all minutes

- Minutes required to be maintained by the Open Meeting Law "shall report the names of all members of such boards and commissions present, the subjects acted upon, and shall record exactly the votes and other official actions taken by such boards and commissions. . . . ." G.L. c. 66, § 5A.
- Reading the Open Meeting Law in conjunction with G.L. c. 66, § 5A makes it clear that the term "actions taken," as used in the Open Meeting Law, requires a record of discussions with respect to the issue discussed, even if no vote is taken or final resolution is reached. However, a verbatim transcript of proceedings is not required. Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 353 (1983).
- No vote taken in open session may be by secret ballot. Obviously, a secret ballot would defeat the purposes of requiring an open session and diminish public accountability.
- Minutes compiled in compliance with the Open Meeting Law are public records. The person having custody of the minutes must permit them to be inspected and examined by any person, under the supervision of the custodian. Moreover, under the Public Records Act, copies of minutes must be provided to persons requesting them upon the payment of a reasonable reproduction fee. The Supervisor of Public Records has held that a "reasonable reproduction fee" is the amount of time needed to segregate the records multiplied by the hourly rate of the employee at the lowest salary level who is competent to perform the sorting.
- Budgetary constraints do not relieve the governmental body of the obligation of maintaining appropriate minutes. Moreover, although no exact time for the preparation of minutes is provided in the statute, a board should produce its minutes within a reasonable time period.
- When there is a public records request, minutes of a meeting may not be withheld simply because the governmental body has yet to formally approve them. Unapproved minutes may be designated "draft - subject to acceptance."
- Anyone in attendance may audio or videotape a meeting. However, any electronic recording must not actively interfere with the meeting.
- In addition to electronic, audio, or videotape formats, minutes must also be maintained on paper. If an audio or videotape is relied upon as a record of the meeting, a synopsis must be reduced to writing.
- If a board chooses to make electronic copies of minutes available to the public by way of the internet or a web site, the electronic minutes

should contain all of the information contained in the official copies. For example, it would be a violation of the spirit of the Open Meeting Law to post incomplete minutes on the town's internet web site as someone relying on the web site would have no way of knowing that the official paper minutes contained additional information.

Provisions pertinent to Minutes of Executive Sessions

- In executive session, all votes must be recorded roll call votes. In this way, when the minutes of the executive session are made public, it is possible for the public to ascertain an official's position.
- The minutes of executive sessions, like those of open session, are public records with the exception that they may be withheld from public inspection so long as the need for secrecy which justified the executive sessions in the first place still prevails, but no longer.
- A board should arrange to regularly review and release executive session minutes that no longer meet the secrecy requirements.
- The governmental body bears the burden of showing a need for nondisclosure of the minutes of an executive session. The Supreme Judicial Court has held that where a school committee met in executive session to discuss dismissing an employee and resulting litigation, and where the employee resigned and litigation was terminated, the purpose of the executive session "evaporated" and the minutes had to be disclosed. Fondy v. Amherst Pelham Reg. School Comm., 402 Mass. 179, 184 (1988).

G.L. c. 66, § 10 describes the method available to the public to enforce their right to inspect public documents. Pursuant to G.L. c. 66, § 1, the Supervisor of Public Records has the power to adopt regulations to enforce the provisions of the statute concerning the content of and access to public records. (See Related Matters, page 24).

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EXECUTIVE SESSIONS

"No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session, and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session." G.L. c. 39, § 23B.

- The statutory procedures to be followed when an executive session is convened are intended, as is the law as a whole, to protect the public's right to know what governmental bodies are doing.
- The burden of showing the need for a closed session rests on the governmental body. District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. 663, 666 (1981).
- Concern that attendance by the press or members of the public may stifle candor is not a proper ground to convene an executive session.
- It is a violation of the law for a governmental body to fail to follow the statutory steps before entering into executive session. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 73 (1978).
- After a governmental body has convened in an open session, for which valid notice has been posted, a majority of the quorum present must vote, by roll call vote, to enter into executive session. "Majority" means a majority of the members present, rather than a majority of the members voting. Thus, on a five-member board with two members abstaining from a vote, two members voting in the affirmative to enter an executive session, and one member voting in the negative, the motion would fail and an executive session would be in violation of the statute. District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 665 (1981).
- The reason for the executive session must be stated in open session before the closed proceeding may be convened. This is to insure that the executive session is held only for one of the specific reasons enumerated by the statute. No other reason is permitted. Yaro v. Board of Appeals of Newburyport, 10 Mass. App. Ct. 587, 588-589 (1980). An executive session may not be held before the posted time of the open session. This is because the governmental body would not have an opportunity to declare the reason for the executive session at the open meeting.
- The statement of the reason for the executive session permits later review of a governmental body's action. The reason stated strictly limits the matters to be considered. On some occasions, courts have compared the reason stated for an executive session, with the minutes of the closed session and with testimony as to what transpired at the executive session, and have reached the conclusion that the reason stated for the closed session was a sham, Puglisi v. School Committee of Whitman, 11 Mass. App. 142, 144 (1981), and that the executive session was held in violation of the statute.
- Attendance at an executive session is generally limited to the members of the governmental body and those whose presence is necessary. For example, if an executive session is properly convened, persons with unique knowledge whose expertise will be of assistance to the governmental body may attend.
- An executive session may be invalidated for failure to cite the correct purpose, even if it could properly have been convened if the governmental body had cited the correct purpose. For example, the Beverly School Committee voted to enter executive session "for the purpose of discussion [sic] strategies related to collective bargaining," then in executive session voted to enter into a contract with an assistant superintendent, a non-union employee. Notwithstanding that the committee could have validly cited its purpose to negotiate with a non-union employee, a justice of the superior court, noting the committee's failure to do so, invalidated the contract. Witwicki v. Beverly School Committee, Essex No. 92-3038 (1993).
- The presiding officer must state whether the governmental body will reconvene in open session after the executive session has been concluded. This is to permit members of the public who attend to make an informed decision whether or not to stay for a reconvened public session.
- Reasons for entering an executive session outside the statute's nine enumerated purposes may not be inferred. Where there is an express exception to a statute, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. District

Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985). In this regard, the statute has been called unambiguous. Embarrassment is not a proper basis upon which to convene an executive session.

- When appropriate, more than one purpose may be cited for an executive session. For example, if the school committee needs to discuss both the deployment of new security measures at a school building and collective bargaining, both the security and collective bargaining exceptions should be cited as reasons for the executive session.
- Even if outside of the governmental body's jurisdiction, matters not relevant to the executive session issue should not be discussed during executive session.

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EXECUTIVE SESSION: PURPOSE 1

Discussion of Reputation, Character or Physical Condition

"To discuss the reputation, character, physical condition or mental health,rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open."

- The purpose of this provision is to strike a balance between an individual's right to privacy and the public's right of access to the governmental process. This purpose is consistent with other statutes which recognize that "a person shall have a right against unreasonable, substantial or serious interference with his privacy," G.L. c. 214, § 18, and which protect against disclosure of information "which may constitute an unwarranted invasion of personal privacy." G.L. c. 4, § 7, clause 26(c).
- The exception is also designed to enable a public body to candidly discuss the character and reputation of an individual who is the subject of potential action by that public body. An individual is protected by the right to be present during discussions or considerations that involve him, the right to have counsel present, and the right to speak in his own behalf. G.L. c. 39, § 23B(1)(a),(b),(c).
- Exclusion of discussions concerning "professional competence" from executive sessions is recognition of an overriding public right to know the qualifications of individuals who are being considered for, or who are actively engaged in public service. The public's right to information is superior, in this instance, to an individual's preference that his professional competence not be the subject of public discussion.
- The courts have recognized that the Open Meeting Law shall be in force "only so far as [it is] not inconsistent with the provisions of any general or special law," G.L. c. 39, § 24. It has been argued that the provisions of statutes recognizing rights against unreasonable, substantial or serious interference with privacy can be used to justify private discussion of a job candidate's qualifications. While no court has recognized an exception for job applicant discussions based upon statutory rights to individual privacy, the Supreme Judicial Court has indicated that it would not recognize such an exception unless it could be shown on the facts of an individual case that "disclosure. . . would have . . . an unreasonable, substantial or serious interference with [a candidate's] . . . privacy." Attorney General v. School Committee of Northampton, 375 Mass. 127, 129-130 (1978). That Court also rejected the school committee's argument that forced disclosure in such circumstances could discourage potential applicants. The court acknowledged that the school committee raised a policy consideration which could be addressed by the legislature, but indicated that it would only consider claims where it was shown that disclosure would impinge on a candidate's statutory right of privacy. Subsequently, the legislature did address such concerns, enacting an additional exception to the Open Meeting Law. (See Reason 8, Preliminary Screening of Employment Applicants at page 18).

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EXECUTIVE SESSIONS: PURPOSE 2

To Consider Discipline, Dismissal, or Complaints Against a Public Officer, Employee, Staff Member or Individual

"To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open."

- The discipline exception to the Open Meeting Law exempts disciplinary action against public employees to protect both the individual's reputation, and the interest of the public in maintaining efficient personnel management and employee morale. Doherty v. School Committee of Boston, 386 Mass. 643, 646 (1982).
- The ultimate decision on whether the meeting is to be in executive session or an open hearing lies with the individual whose discipline or dismissal is to be discussed. If the individual requests that the meeting be public, the governmental body proposing an executive session must comply with that request.
- The statute mandates that if an executive session is held, the subject has a right to be present during "discussions or considerations" which involve him, to speak on his own behalf, and to have counsel of his choice present to advise him (but not to actively participate). G.L. c. 39, § 23B(2)(a),(b),(c). An individual's exercise of his rights under the Open Meeting Law is "in addition to the rights an individual may have from any other source," and may not be considered a waiver of any other rights.
- Discussion of employee grievances normally falls within the Open Meeting Law's "collective bargaining session" exception, and thus may take place in executive session. However, where the legislature has not statutorily provided for a closed disciplinary hearing, the Open Meeting Law's proviso of an "express statutory right of a public employee to have his dismissal considered at a public session takes precedence over the more general [collective bargaining] exception." Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308 (1990).
- Dismissal of teachers. G.L. c. 71, § 42 modifies the dismissal procedures for teachers. (St. 1993, c. 71, § 44). Under the procedure,

dismissal is initiated first by the principal, and then reviewed by the superintendent, and finally, an arbitration panel. Since neither the superintendent nor the principal is subject to the Open Meeting Law, teacher dismissal hearings remain outside the scope of the law.

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EXECUTIVE SESSION: PURPOSE 3

Litigation Strategy / Collective Bargaining

"To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel."

- Although the statute originally referred only to "collective bargaining," a 1985 amendment to c. 39, § 23B expanded this exception to include bargaining sessions or contract negotiations with non-union personnel. The amendment came in response to several cases that recognized that open and public contract negotiations with non-union personnel may be detrimental to ongoing collective bargaining with union groups.
- Executive sessions to discuss strategy with respect to collective bargaining with union personnel can be held only if a governmental body can establish that an open meeting will have a detrimental effect on the bargaining position of the governmental body.
- "Collective bargaining sessions" encompass not only negotiations leading to a collective bargaining agreement, but also the resolution of grievances pursuant to a collective bargaining agreement. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 73 (1978); Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308 (1990).
- The failure of a governmental body to agree to negotiate with collective bargaining agents in executive session, over the objection of the bargaining agents, constitutes a failure to negotiate in good faith. Selectmen of Marion v. Labor Relations Commission, 7 Mass. App. Ct. 360, 361 (1979).
- The collective bargaining/litigation exception recognizes that public officials might be unduly hampered in the performance of their duties if all gatherings of such bodies were required to be open to the public. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72-73 (1978).
- The litigation exception deals with strategy meetings concerning ongoing litigation, and permits executive sessions in those circumstances where a governmental body can properly anticipate a legal challenge to its proposed action because of a threat of a specific lawsuit and where an open meeting will have a detrimental effect on the litigating position of the governmental body. Doherty v. School Committee of Boston, 386 Mass. 643, 648 (1982).
- The litigation strategy exception is not properly invoked broadly in all situations where the governmental body anticipates litigation. Mere speculation that someone might file a lawsuit is insufficient. The governmental body must anticipate a legal challenge to its proposed action because of a specific lawsuit, and it must be shown that discussing the strategy in open session will have a detrimental effect on the litigation position of the government body. Doherty v. School Committee of Boston, 386 Mass. 643, 647-648 (1982).
- Despite the fact that legal challenges are common, zoning boards of appeals, planning boards and other local license and permit granting boards are fully subject to the Open Meeting Law and cannot conduct their deliberations on permit granting decisions in executive session. Yaro v. Board of Appeals of Newburyport, 10 Mass. App. Ct. 587, 590-591 (1980).
- The litigation exception is not synonymous with the attorney-client privilege. The Supreme Judicial Court has rejected a claim that the Open Meeting Law does not apply to a private meeting of a governmental body with its attorney or that a meeting between a board and its attorney may automatically be held in executive session. Unless such a meeting falls within one of the nine specific statutory exceptions to the Open Meeting Law, such discussions must be held in open session. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 634 (1985).
- A board cannot properly meet in executive session with the sole opponent in litigation because the governmental body's litigating position cannot be impaired when the opponent is present.

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EXECUTIVE SESSION: PURPOSES 4, 5, 6, 7

- **Security Personnel or Devices**
- **Investigation of Charges of Criminal Misconduct or Discussion of Filing of Criminal Complaints**
- **Discussion of Purchase, Exchange, Lease or Value of Real Property**
- **Compliance with General or Special Law, or Federal Grant-in-Aid Requirements**

"To discuss the deployment of security personnel or devices."

- Open discussion of such issues in public would be self-defeating.
- The legislature has provided an exception to permit confidential communications so that public officials will not be "unduly hampered" by the general requirement that business be conducted in the open.
- As a rule, deployment of "security personnel" will not include routine assignment of police officers.

"To investigate charges of criminal misconduct or to discuss the filing of criminal complaints."

- The law recognizes that it may be inconsistent with effective law enforcement to conduct criminal investigations in the public eye.
- Indeed, public access to information related to criminal misconduct should be restricted in certain circumstances. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976).
- It should be noted, however, that general complaints or charges against individuals, as opposed to criminal complaints, are governed by the second exception to the Open Meeting Law, and executive sessions are limited by the procedural protections afforded the individual under that exception.
- Governmental bodies must proceed with caution to distinguish between instances that properly fall within exception two, rather than exception five. For example, a school committee may meet to discuss the discipline of a student who has assaulted another student. If the committee is meeting to discuss expulsion of the student without intending to explore a criminal option, it would be inappropriate to meet under reason (5).

"To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation."

- This exception recognizes that public discussion of the negotiations described would invite speculation and could drive up the eventual price paid by the government.
- If there is no prospect that public discussion may have a detrimental effect, the exception may not be invoked.
- While it has been suggested that other large contract negotiations should also be exempt from the requirement of the Open Meeting Law, the Supreme Judicial Court has indicated that all exceptions to the Open Meeting Law are limited by the choice of language contained in the statute and that "the legislative mandate cannot be misunderstood." District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985).

"To comply with the provisions of any general or special law or federal grant-in-aid requirements."

- There may be provisions in certain statutes or the conditions of certain federal grants that require the discussion of particular issues in executive session.
- With respect to federal grants-in-aid, it is the intention of this exception to prevent the Open Meeting Law from operating as a disqualification for such grants to cities and towns if confidentiality is required.

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EXECUTIVE SESSION: PURPOSE 8

Preliminary Screening of Employment Applicants

*"To consider and interview applicants for employment by a preliminary screening committee or subcommittee of governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants, provided that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or subcommittee, to consider and interview applicants who have passed a prior preliminary screening."*G.L. c. 39, § 23B.

- This exception, added in 1987, recognizes a job applicant's rights to privacy in preliminary discussions, as well as a governmental body's need for confidentiality in such discussions in order to attract qualified applicants.
- By its express terms, this exception is limited to a preliminary screening committee or subcommittee of a governmental body. Note that the exception may not be invoked unless an open meeting will have a detrimental effect in obtaining qualified applicants. It behooves a government body, therefore to establish a basis in the record for believing that such a "detrimental effect" would in fact occur. If even one candidate indicates that he would withdraw if his identity were made public during the initial screening process, there is a sufficient basis to justify executive session. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 470 (1989).
- The "preliminary screening" is not "limited to a one-time only review of an applicant's credentials." Gerstein v. Superintendent Search Screening Committee, 405 Mass. at 471.
- Nothing in the law appears to prohibit a government body from appointing itself as a screening committee.[1]

  [1]*But several years ago, the Attorney General's Office apparently reached the opposite conclusion, claiming that the exemption "does not apply . . . to a screening by a governmental body itself . . . [but] only to a special committee or subcommittee." Harshbarger, Open Meeting Law Guidelines, p. 24.*
- Regardless of who performs preliminary screening, finalists must be interviewed in open session.
- The screening committee is subject throughout the process to the Open Meeting Law. It must post notices of its meetings, meet in open session, and enter into executive sessions where appropriate and in accordance with the statutory procedures. It must also maintain minutes of the meetings.
- Only the preliminary screening and interviewing may take place in executive session.
- Related matters, such as a discussion as to whether to survey the community or hire a consultant, must take place in open session.

Certain kinds of advisory committees fall outside the Open Meeting Law. Such committees are those established by an official legally authorized to make a selection or required to make a recommendation to the hiring body. The Supreme Judicial Court has held that a superintendent of schools, required by G.L. c. 71, § 38 to make a recommendation to the School Committee for the position of principal, could appoint an advisory screening committee which, like the superintendent himself, was not subject to the Open Meeting Law. Connelly v. School Committee of Hanover, 409 Mass. 232, 238 (1991).

The limited scope of this decision is apparent from the court's pointed observation that "if the selection committee were otherwise subject to the Open Meeting Law, having it nominally appointed by the superintendent would be to no avail." Connelly v. School Committee of Hanover, 409 Mass. at 236, n. 8. Of course, nothing prohibits a committee outside the scope of the open meeting law from voluntary compliance with its strictures.

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EXECUTIVE SESSION: PURPOSE 9

To Meet or Confer With a Mediator

"To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of mediation with deliberation and approval for such action at an open meeting after such notice as may be required in this section." G.L. c. 39, § 23B.

- This reason was added to the statute in 1994.
- G.L. c. 233, § 23C provides:
    - For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.
- The rationale for this reason is similar to that for the litigation/collective bargaining exception: if conferring with the mediator in open session might unduly hamper the governmental body's ability to mediate a dispute, mediation may take place in executive session.
- Issues mediated must be deliberated and approved during an open session before action may be taken.

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ENFORCEMENT

"The District Attorney of the county in which the violation occurred shall enforce the provisions of this section." G.L. c. 39, § 23B.

- The District Attorney enforces the Open Meeting Law. The Attorney General and groups of three or more registered voters are also empowered to file complaints seeking relief from violations of the Open Meeting Law in the Supreme Judicial and Superior Courts.
- The District Attorney's Office is limited to the enforcement of the Open Meeting Law and cannot enforce zoning regulations, municipal charters and the like. It is beyond the jurisdiction of this Office to resolve municipal disputes involving anything other than the Open Meeting Law.
- The District Attorney encourages governmental bodies, their counsel and interested parties with questions about contemplated procedures to request an advisory opinion before meeting. This should allow governmental officials to have confidence in the procedures they follow and reduce the number of investigations and violations.
  Procedure Followed by the Norfolk County District Attorney's Office:
- Although an assistant district attorney may in some circumstances be able to provide guidance by telephone, a person who desires investigation as to whether the law was violated or who desires a prospective ruling as to potential actions must make the inquiry in writing.
- When the inquiry is received, it is assigned a case number and reviewed by an Assistant District Attorney assigned to handle Open Meeting Law matters.
- Unless it is possible to determine from the face of the inquiry that no violation took place (a fairly unusual occurrence), a copy of the inquiry will be sent to the government body in question with a request for a prompt response. Where an inquiry seeks an advisory opinion as to the appropriateness of contemplated actions, the matter may be resolved based on the inquiry and relevant materials.
- That the complaining party may have a personal or political reason to seek enforcement of the Open Meeting Law is irrelevant to the District Attorney's enforcement of the Open Meeting Law. Likewise, that the governmental body alleged to be in violation of the Open Meeting Law seeks to achieve a particular end is irrelevant to the District Attorney's enforcement of the Open Meeting Law. This Office focuses upon the alleged violation of the Open Meeting Law rather than motives the parties may attribute to one another.
- The assistant district attorney may ask the complainant and/or the governmental body for additional information. Copies of audio or videotapes of meetings often help determine whether any violation of the Open Meeting Law occurred.
- The governmental body has the burden of proving, by a preponderance of the evidence that a violation did not occur. G.L. c. 39, § 23B. It is particularly important, therefore, that the board's response to the District Attorney's Office be thorough.
- After hearing from interested parties and reviewing relevant information, the District Attorney's Office issues a ruling. If a violation is found, a remedy will be proposed. If the board agrees to implement the remedy, the case is settled. If it does not, the District Attorney may initiate a court suit against the offending body.
- The Open Meeting Law allows the imposition of $1,000.00 fine against the offending body. (Ch. 455 of the Acts and Resolves of 1994).
- The experience of the District Attorney has been that governmental bodies voluntarily implement proposed remedies, thus allowing full enforcement of the law at minimal cost.

- The District Attorney's Office is eager to assist with interpretation of the Open Meeting Law. Generally, towns should first consult with town counsel, who are familiar with local issues and may be aware of statutes and regulations apart from the Open Meeting Law which may, in some instances, be dispositive.

"Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions for public notice of meetings, for holding Open Meetings, or for maintaining public records thereof, any justice of the Supreme Judicial Court or the Superior Court sitting within and for the county in which such governmental body acts shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings." G.L. c. 39, § 23B.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

- Anyone seeking judicial invalidation of a board's action must file a civil complaint in the Superior Court within 21 days of the action becoming public. This route is only necessary when the complaining party seeks invalidation of the action taken at the meeting. A judge has the discretion to impose other remedies, including injunctive relief and fines against the government body.
- Courts ordinarily do not take action against an offending board where the violation is remedied before the court hears the case. Thus, when someone was terminated in violation of the law, then properly dismissed at a later meeting, the court declined to order reinstatement, but instead awarded back pay from the date of the invalid meeting to the date of the valid one. Puglisi v. School Committee of Whitman, 11 Mass. App. Ct. 142, 146-147 (1981). The same remedy, on similar facts, was afforded in Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306 (1990). These cases point to the wisdom of promptly correcting violations of the Open Meeting Law.
- The complaining party is generally not entitled to attorney's fees. However, if the government body's claims are "wholly insubstantial, frivolous and not advanced in good faith," attorneys' fees may be awarded under G.L. c. 231, § 6F. Pearson v. Board of Health of Chicopee, 402 Mass. 797, 801 (1988).

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RELATED MATTERS

The District Attorney for the Norfolk District handles Open Meeting Law inquiries arising out of municipalities in Norfolk County. The Worcester County District Attorney handles open Meeting Law inquiries originating in Bellingham.

The District Attorney for the Norfolk District
45 Shawmut Road, 2nd Floor
Canton, MA 02021
Telephone: (781) 830-4800
Facsimile: (781) 830-4801
website: http://www.state.ma.us/da/norfolk/index.html

The Public Records Law

Minutes compiled in accordance with the requirements of the Open Meeting Law are public records. The minutes of executive sessions are also public records, with the exception that they may be withheld from public inspection only so long as the need for secrecy which justified the executive session exists, but no longer.
Public Records Law: G.L. c. 66, § 10
Public Records definitions: G.L. c. 4, § 7, clause 26
Public Records Access Regulations: 950 CMR 32.00

The Supervisor of the Public Records Division at the Office of the Secretary of State handles inquires about public records (i.e., minutes) and may be contacted as follows:
Secretary of the Commonwealth Public Records Division
One Ashburton Place
Boston, MA 02108
(617) 727-2832
www.state.ma.us/sec

The Role of the Massachusetts Attorney General

Pursuant to G.L. c. 30A, § 11A ½, the Attorney General is charged with enforcing the Open Meeting Law with respect to boards created by state agencies.
Attorney General
One Ashburton Place, 20th Floor
Boston, MA 02108
(617) 727-2200
www.ago.state.ma.us

General resource:
Ann Taylor Schwing, Open Meeting Laws 2d, Fathom Publishing Company, 2000.

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Appendix

The Open Meeting Law

(Current as of May, 2002)
G.L. c. 39, § 23A.

Definitions
The following terms as used in sections twenty-three B and twenty-three C shall have the following meanings:

"Deliberation": a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction. *"Emergency"*: a sudden, generally unexpected occurrence or set of circumstances demanding immediate action. *"Executive session"*: any meeting of a governmental body which is closed to certain persons for deliberation on certain matters. *"Governmental body"*: every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting. *"Made public"*: when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body. *"Meeting"*: any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program. *"Quorum"*: a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.
G.L. c. 39, § 23B.

Open meetings of governmental bodies

All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.

No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.

No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.

Nothing except the limitation contained in this section shall be construed to prevent the governmental body from holding an executive session after an open meeting has been convened and a recorded vote has been taken to hold an executive session. Executive sessions may be held only for the following purposes:

1. To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:
    a. To be present at such executive session during discussions or considerations which involve that individual.
    b. To have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session.
    c. To speak in his own behalf.
2. To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:
    a. To be present at such executive session during discussions or considerations which involve that individual.
    b. To have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation.
    c. To speak in his own behalf.
3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.
4. To discuss the deployment of security personnel or devices.
5. To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.
6. To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.
7. To comply with the provisions of any general or special law or federal grant-in-aid requirements.
8. To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or a subcommittee appointed by a governmental body, to consider

and interview applicants who have passed a prior preliminary screening.

9. To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

This section shall not apply to any chance meeting, or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power.

Except in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town. The secretary of a regional school district committee shall be considered to be its clerk and he shall file the notice of meetings of the committee with the clerk of each city or town within such district and each such clerk shall post the notice in his office or on the principal official bulletin board of the city or town and such secretary shall post such notice in his office or on the principal official bulletin board of the district. If the meeting shall be of a regional or district governmental body, the officer calling the meeting shall file the notice thereof with the clerk of each city and town within such region or district, and each such clerk shall post the notice in his office or on the principal official bulletin board of the city or town. The notice shall be printed in easily readable type and shall contain the date, time and place of such meeting. Such filing and posting shall be the responsibility of the officer calling such meeting.

A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

Upon qualification for office following an appointment or election to a governmental body, as defined in this section, the member shall be furnished by the city or town clerk with a copy of this section. Each such member shall sign a written acknowledgement that he has been provided with such a copy.

The district attorney of the county in which the violation occurred shall enforce the provisions of this section.

Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions for public notice or meetings, for holding open meetings, or for maintaining public records thereof, any justice of the supreme judicial court or the superior court sitting within and for the county in which such governmental body acts shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney of the county in which the city or town is located. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of such complaints the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by section eleven A 1/2 of chapter thirty A, by section nine G of chapter thirty-four or by this section. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

Any such order may also, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy. Such order may also include reinstatement without loss of compensation, seniority, tenure or other benefits for any employee discharged at a meeting or hearing held in violation of the provisions of this section.

Such order may also include a civil fine against the governmental body in an amount no greater than one thousand dollars for each meeting held in violation of this section.

The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session, are in addition to the rights that an individual may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements, and the exercise or nonexercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

G.L. c. 39, § 23C.

Regulation of participation by public in open meetings

No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall,

at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned.

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